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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES, PETITIONER

v.

BINGHAMTON CONSTRUCTION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on October 7, 1952, by the United States Court of Claims.

OPINION BELOW

The opinion of the Court of Claims (R. 65) is reported in 107 F. Supp. 712.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1952 (R. 72). Both parties moved for a new trial. The motions were overruled on January 13, 1953 (R. 73). Plaintiff's motion to

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renew its motion for new trial was overruled on February 25, 1953. On April 11, 1953, Chief Justice Vinson extended the time of the United States within which to file a petition for a writ of certiorari to and including May 13, 1953 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the schedule of minimum wage rates specified in a government construction contract, pursuant to the Davis-Bacon Act, is a representation or warranty to the successful bidder that it will not have to pay higher wages to attract workers.

STATUTE INVOLVED

The Davis-Bacon Act (Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U.S.C. 276a) provides in pertinent part:

> * * * That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil

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subdivision of the State in which the work is to be performed * * * ; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.

PROVISIONS OF THE CONTRACT INVOLVED

Section 1-31 of the specifications furnished bidders provided:

1-31. *Wage and Labor Provisions.*

(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate-hourly*
Carpenters, Journeymen.....	$1.00
* * * * *	
Laborers, unskilled.....	0.50
Laborers, Concrete Puddlers.....	0.50

Article 17 of the contract involved (No. W-321-eng-261) reads as follows:

Article 17. *Rate of Wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1

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[40 U. S. C. A. §§ 276a, 276a-1]), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).—

* * * * *

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Paragraph 1-12 of the Standard Government Form of Invitation for Bids provided in pertinent part as follows:

Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local

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conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work.

STATEMENT

On January 31, 1941, upon the request of the Corps of Engineers, the Secretary of Labor furnished a schedule of minimum wages for inclusion in the contract specifications for a flood protection project (Flood Protection Project (Section No. 1)), along the north bank of the Chemung River, within the limits of the city of Elmira, New York. This schedule, which set the hourly wage rate for carpenters at $1.00 per hour and for unskilled labor at $.50 per hour, was included in the specifications furnished to respondent prior to the computation of its bid. In response to invitations for bids issued on March 29, 1941, respondent submitted a bid, based upon a unit price applied to the various operations involved in the performance of the work, in the amount of $232,669.30. The Government accepted respondent's bid on May 14, 1941. It entered into a written contract, No. W-321-eng-261, approved June 3, 1941. On June 5, 1941, respondent received formal notice to proceed with the work.

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On October 22, 1940, the Elmira business agent of the carpenters' local informed the United States Engineer's Office in Binghamton, New York, that the wage scale for carpenters would be increased from $1.00 per hour to $1.125 per hour as of January 1, 1941 (R. 43). On October 29, 1940, receipt of the letter was acknowledged (R. 43).

On March 4, 1941, prior to the issuance of the invitations for bids on the Chemung River project, the Secretary of Labor had furnished the Public Buildings Administration of the Federal Works Agency "a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira" (R. 44). The schedule showed the prevailing hourly rates on that type of project for Journeymen Carpenters at $1.125 and for unskilled laborers as $.55.

Although not so required, respondent employed only union labor on the flood protection project. On June 3, 1941, when respondent began work on the site it had to pay $.625 per hour for laborers and $1.125 per hour for carpenters. The carpenter wage rate had been put into effect by the union on January 1, 1941, and the laborer wage rate on April 1, 1941.

On June 16, 1941, respondent advised the District Engineer (who was also the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality (R. 44). When relief was denied, respondent protested to

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the Chief of Engineers who denied the appeal and disclaimed authority to question the correctness of any determination made by the Secretary of Labor (R. 44). On reconsideration, respondent received a reply reading in part as follows:

> A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1-31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941.

Respondent thereupon brought suit in the Court of Claims on various items, *inter alia* for $15,597.38, the difference in cost between $1.00 and $1.125 (in wages for carpenters) and between $.50 and $.625 (in wages for unskilled laborers and concrete puddlers). The Court of Claims specifically found that "If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour effective as of April 1, 1941" (R. 45). Nevertheless, it al-

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lowed respondent to recover $7,363.22, on the ground that when the Corps of Engineers represented that the Secretary of Labor had determined the prevailing wage rates to be $.50 and $1.00, this was a positive misrepresentation of the Secretary's latest determination, upon which respondent was entitled to rely. It was "a representation of the wages it would have to pay when the work was to be done." (R. 68).[1]

REASONS FOR GRANTING THE WRIT

The short of this case is that the Court of Claims has turned the contractual provision required by the Davis-Bacon Act—that respondent pay laborers on its project not less than prescribed minimum wages—into a warranty by the United States that the respondent will be able to obtain laborers at those minimum rates. This interpretation of the standard building contract provision for minimum wages plainly goes beyond its terms and scope, and thrusts an unjustified burden upon the Government which is compelled by the statute to use such a clause.

1. The Davis-Bacon Act was designed for the benefit of workers in the construction field, and minimum wage schedules are required by the Act to be included in building contracts solely to fulfil

[1] The recovery did not include the difference between $.55 and $.625, which was the increase the union obtained for unskilled labor on April 1, 1941; it was not shown that the District Engineer knew or should have known of the increase, and the evidence did not show whether the Secretary of Labor had made a wage determination recognizing this rate prior to the acceptance of respondent's bid.

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the legislative purpose of putting a floor on wages and thus protecting workers against substandard wages. *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788 (C.A. 2), certiorari denied, 305 U.S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585 (C.A. 5); cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. The precise terms of the contract bear out this reading that protection of the builder's employees is the only purpose of the minimum wage provisions. Specification 1-31 (*supra*, p. 3) declares that the Secretary of Labor has determined that certain "minimum wage rates" are to be applicable in the locality of the work, and then goes on to provide that in accordance with Article 17 of the contract "employees at the site shall be paid not less than these wages * * *".[2] Article 17 gives the Government the right to terminate the work if the contractor pays *less* than the required wages. In the context of Article 17 and the Davis-Bacon Act, specification 1-31 represented the objective and true fact that the Secretary of Labor had determined that carpenters would have to be paid $1.00 an hour and unskilled laborers $.50 an hour to comply with the minimum wage statute. Nowhere within the four corners of the contract is there a representation or warranty that the minimum

[2] The specification states that "In accordance with Article 17 of the contract, employees at the sites shall be paid *not less* than these wages as listed below" (emphasis added). In contrast, in *Irwin & Leighton* v. *United States*, 115 C. Cls. 18, 23, 33, where the Court of Claims held there was no misrepresentation by the Government, the specification read that "The wages *to be paid* laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing * * * *are as follows*: * * *" (emphasis added).

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wage is the maximum or the only wage that will have to be paid. *Winn-Senter Constr. Co.* v. *United States,* 110 C. Cls. 34, 61. Nor can such a warranty be reasonably implied. The Government's sole concern was with assuring that the builder would pay *at least* the prescribed minima, and the employees would receive *at least* those amounts. The Government was not concerned to protect the contractor against paying higher wages nor to guarantee to him that sufficient employees could be hired at the established minimum.

The Davis-Bacon Act does admonish the Secretary to base the contractual minima on the wages "prevailing" in the locality, and it is on this statutory requirement that the Court of Claims pins its conclusion that the wage schedule in this case was a misrepresentation, since the prevailing rates were found to be higher.[3] But a statement or declaration by one party, made for a limited purpose, cannot be held a misrepresentation in other contexts if the second party is not entitled to rely on it for such other purposes. And it is plain, both from the terms and aims of the Davis-Bacon Act and from the wording and purpose of the contract provisions, that the Secretary made her determination of minimum wages solely to protect the workers and to fulfil the demands of the minimum wage law and not for the benefit of the contractor by giving him information as to the wages at which he could attract workers. Indeed, the Secretary

[3] The contract itself does not refer to "prevailing" wages but speaks only of "minimum wage rates". *Supra,* pp. 3-4.

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had no authority to determine "prevailing" or minimum wages for any end not related to her protective functions under the Davis-Bacon Act.

All this is made even clearer by other significant contractual provisions clearly warning the contractor to inquire for himself. Paragraph 1-12 of the Invitation for Bids (*supra*, pp. 4-5) calls upon bidders to ascertain for themselves "the difficulties attending the execution of the proposed contract, including local conditions, availability of labor * * *."[4] Information as to wage rates would be at least equally accessible to a local contractor doing business in the community, and the Court of Claims expressly found that "If plaintiff's president had investigated wage rates, he could have ascertained" the true prevailing rates and the wages the union would insist on (R. 45).[5] Moreover, contractors know in advance that the Secretary's determination can be, at best, only an approximation.[6] For the court to increase the contract price after completion of the work, on the basis of a judicial redetermination of prevailing wages, would confer an unfair preference on contractors who neglect to comply with the clear warning to investigate, over diligent bidders who do in-

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[4] Of course, the "availability of labor", of which the bidders were to make their own estimates, is directly related to the wage level.

[5] The contract did not expressly or impliedly require the contractor to supply union labor. See *supra*, p. 6.

[6] The procedure and sources for the predetermination of rates of wages, described in Title 29, C.F.R. Subtitle A, Part 1, Secs. 1.1-1.20, show the inevitability of differences of opinion.

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vestigate and therefore anticipate the possibility of higher wage levels in making their bids.

To evolve representations and warranties from determinations made to prevent underpayment of workers also contravenes the consistent procurement policy of the Government, which has been to prevent reliance by contractors on general statements by government officers in place of their own diligent investigations, appraisals, and exercise of business judgment. This policy is reflected both in disclaimer provisions and in provisions requiring contractor self-reliance and charging contractors with possession of the knowledge their own investigation would have disclosed[7] The Court of Claims enlarges the Government's obligations beyond those expressly or by fair implication assumed, in the face of repeated admonitions by this Court. *Smoot's Case,* 15 Wall. 36, 45. The court below "was more generous * * * than the language of the contract requires." *Southern Ry. Co.* v. *United States,* 322 U.S. 72, 76-77.

2. In rejecting the Secretary's wage determination as incorrect, the Court of Claims in effect subjected it to judicial review at the contractor's instance, contrary to the settled rule. *Alliance Construction Co.* v. *United States,* 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 127. And it is irrelevant, in this connection, that the Secretary later made a wage determination in the

[7] See *Maguire & Co.* v. *United States,* 273 U. S. 67; *MacArthur Bros. Co.* v. *United States,* 258 U.S. 6; *United States* v. *Silverton,* 200 F. 2d 824, 827 (C.A. 1).

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locality higher than that prescribed for this particular contract (*supra*, p. 6). Even if the subsequent finding were admittedly inconsistent, the bidder or contractor would have no standing to complain, since these wage determinations are solely for the employees' benefit and not his. As long as the Government abides by the earlier determination and does not insist on payment of the intervening increase, the contractor has nothing to challenge.

But the fact is that here there was no inconsistency between the earlier and later findings. As bidders know, the time lag between a request for a wage determination, on the one hand, and completion and reporting of the Secretary's holding, on the other, is usually two or three months; it is obvious that changes may occur and are foreseeable by both parties.[8] The Government plainly did not insure against an increase in wage levels between the time the determination is made and the time (i) the invitations to bid are drawn up and are issued, (ii) the bids are filed, (iii) the successful bidder is notified that he has been awarded the contract, and (iv) work on the project is begun.

Moreover, the second determination in this case

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[8] See Title 29, C.F.R., Subtitle A, Part 5, Sec. 5.4. Under the 1935 amendment, the Secretary writes the prevailing rate of wages into the contract in advance rather than after a dispute has arisen, as under the 1931 Act. *Gillioz* v. *Webb*, 99 F. 2d 585, 587 (C.A. 5).

S. 3487, as amended, 72nd Cong., 1st sess., would have had the predetermined wage rates increase or decrease during the performance with a corresponding adjustment in the contract price. H. Rep. 1441, 72nd Cong., 1st sess.; 75 Cong. Rec. 12381-7. It was vetoed. S. Doc. 134, 72nd Cong., 1st sess.

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was for entirely different work, a separate housing project, and the Secretary made no new determination for the flood protection project on which respondent was the contractor.[9] It is for this reason that *Albert & Harrison, Inc.* v. *United States,* 107 C. Cls. 292, certiorari denied, 331 U.S. 810, on which the court relies (R. 68), does not support it here. We believe that the *Albert & Harrison* decision was erroneous, but it is significant that, in any event, the alleged misrepresentation there was

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[9] There may be different determinations by the Secretary of Labor for different projects in the same city. The Act requires a determination of wages prevailing on projects of a character similar to the contract work.

The finding that "On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York" (R. 44), neither matches nor supports the opinion, which states that at the time of the invitation for bids on March 29, 1941, "the Secretary of Labor had since issued a new determination of the prevailing wage rates for Elmira" (R. 66). All the Secretary had actually done was to make a determination of wages on a separate housing project. The findings do not justify the inference that the January 29, 1941, determination for the flood project, so far as it went, was superseded. Cf. *Irwin & Leighton* v. *United States,* 115 C. Cls. 18, 41-42.

But unless a superseding determination was made, the whole misrepresentation hypothesis falls. The Court of Claims took judicial notice of an identity that may very well not exist. Building houses may call for higher skill and be more exacting than erecting and placing the wooden forms or supports to hold the concrete poured for the walls of flood protection projects. And by the Court of Claims' own approach (as to the increase from $.55 to $.625 for laborers) "a wage determination recognizing" a new rate "prior to the acceptance of plaintiff's bid" is a requisite (R. 69). The contracting officer's failure to ascertain, before inviting bids, whether or not the Secretary of Labor had made a redetermination of the prevailing wage rates after her determination of January 29, 1941, is without significance if no redetermination had in fact ever been made. The January 29, 1941, determination would still be the latest determination, and the only one applicable to the flood project.

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as to the wage rate the Secretary of Labor had fixed on April 4, 1941, a week before the invitation to bid was issued. The bricklayers demanded the prevailing rate as determined in April by the Secretary of Labor for the same Raritan Arsenal instead of rates determined October 26, 1940; the contracting officer, although he knew of the higher rate for the Arsenal, withheld it from the contractor.

3. The Government enters into a large number of construction contracts each year, most of which are subject to the Bacon-Davis Act. The holding which the Court of Claims reaffirms here puts the Government under a continuing duty to check wage rates and keep all bidders advised; on the other hand, it not only relieves the contractor of the risk of ascertaining the wages which it took by entering into the contract without investigating (cf. *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379), but justifies it in building on the Secretary's determination as an assurance of what it will have to pay. If this ruling is to be followed, the consequence will have to be either an uncalled for and burdensome change in Bacon-Davis procedures or the imposition of large and unnecessary costs on the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MAY, 1953.

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